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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID F. DUNBAR et al. as Trustees, etc.,

Plaintiffs and Respondents,

v.

STEPHEN G. WILLIS,

Defendant and Appellant.

D054146

(Super. Ct. No. P191122)

APPEAL from a judgment of the Superior Court of San Diego County, Gerald C. Jessop, Judge. Affirmed.

Appellant Stephen Willis and his uncle, Dr. Stanley Willis, were members of a limited liability company (LLC) that owned the Park Manor Suites Hotel (Hotel) in San Diego.¹ During his lifetime, Dr. Willis transferred his membership interest in the LLC into his revocable trust. After Dr. Willis died, two independent successor trustees of Dr.

¹ Throughout the litigation, the parties have designated Stephen Willis by his first name and Stanley Willis as Dr. Willis. We will do the same.

Willis's trust (Trustees)² petitioned the court for approval of certain proposed actions, including dissolving the LLC, marketing and selling the Hotel, and distributing the assets to the named trust beneficiaries. Stephen opposed the petition, asserting he had an immediate right to purchase Dr. Willis's former interests in the LLC (or a portion of those interests).

The parties agreed to have the matter heard by a referee. (Code Civ. Proc., § 638.) After an evidentiary hearing, the referee found in favor of the Trustees and authorized the Trustees to: (1) market and sell the property; (2) liquidate the LLC; and (3) either "distribute the net proceeds" from the liquidation of the LLC, or distribute the trust's interest in the LLC "in kind . . . among the specific gift beneficiaries" identified in Dr. Willis's trust. The referee also awarded \$298,114 in attorney fees to the Trustees. The superior court entered a judgment incorporating these rulings.

Stephen appeals. We affirm the judgment.

FACTUAL SUMMARY

Background

In 1978, Dr. Willis and Stephen purchased the Hotel and later formed a partnership to hold the Hotel. Dr. Willis owned an 88 percent interest and Stephen owned a 12 percent interest. In 1995, Dr. Willis and Stephen converted their partnership

² These trustees are David Dunbar and Susanna Starcevic. Stephen's former wife, Elizabeth Willis, was also a successor trustee, but did not participate in the action.

into an LLC, known as the Gentry Associates LLC (Gentry LLC), and conveyed their interests in the Hotel into the Gentry LLC.³

Operating Agreement

In mid-December 2001, Dr. Willis and Stephen entered into an amended operating agreement (the Operating Agreement) governing the parties' rights and obligations in the Gentry LLC. At that time, Dr. Willis still held an 88 percent membership interest and Stephen had a 12 percent interest. The Operating Agreement designated Dr. Willis as the manager of the Gentry LLC, and gave Dr. Willis (as the supermajority owner) the unilateral power to effectuate major changes in the business, including to sell the business, remove the manager, and dissolve the LLC.

Certain additional provisions of the Operating Agreement are of particular relevance here. First, Article VII governs the parties' rights to transfer a "Membership Interest." A "Membership Interest" is defined to mean the "Member's entire interest in the Company, including the Member's Economic Interest [and] the right to vote on or participate in the management and the right to receive information concerning the [Company's] business and affairs" Section 7.1 states that no transfer of a "Membership Interest" may occur "except with the prior written consent of the Manager."

³ The parties later formed another LLC, known as the Landed Gentry LLC, to hold the Hotel's real property. However, this LLC was later merged into the Gentry LLC, and thus there is no need to discuss this entity separately. Additionally, we omit reference to the LLC interests owned by former spouses because this ownership is not relevant to the appellate issues. For similar reasons, we do not include a discussion of the LLC interests previously owned by a third party (Arnold Kirkeby).

Section 7.4 establishes an exception to this rule, providing a Member may transfer a Membership Interest without the "prior written consent of all the Members" in two ways: "(i) by inter vivos gift or by testamentary transfer to any spouse, parent, sibling, in-law, child or grandchild of the Member or to a trust for the benefit of the Member . . . or (ii) [a transfer] to any Affiliate of the Member, it being agreed that in executing this Agreement each Member has consented to such transfers." Section 7.4 also provides that a transfer to a tax exempt or educational entity is permissible without prior approval.⁴ Section 7.8 states that if a Member proposes to transfer "all or any part of his or her Membership Interest . . . other than pursuant to Section 7.4," the Member is required to "first offer such Membership Interest to the Company and the non-transferring Members in accordance with [specified notice and payment procedures]."

Article VIII of the Operating Agreement contains provisions pertaining to the consequences of the "death, retirement, permitted withdrawal or bankruptcy of a *Member*" of the LLC. (Italics added.) A "*Member*" is defined to mean "each *Person* who (a) is an initial signatory to this Agreement, has been admitted to the Company as a Member in accordance with the Articles or this Agreement, or is an assignee who has become a Member in accordance with Article VII and (b) has not resigned, withdrawn, been expelled or, if other than an individual, dissolved." (Italics added.) A "*Person*" is defined as "an individual, general partnership, limited partnership, limited liability

⁴ This provision was added as an additional amendment shortly after the parties executed the 2001 Operating Agreement.

company, corporation, *trust*, estate, real estate investment trust association or any other entity." (Italics added.)

Several months after both parties signed this amended Operating Agreement, on December 25, 2001, Dr. Willis gifted small fractional economic interests in the Gentry LLC to Stephen's son and to attorney Michael Evans. Stephen knew of, and encouraged, these transfers.

Dr. Willis's Trust

Almost two years later, in October 2003, Dr. Willis conveyed his entire interest in the Gentry LLC into his revocable living trust (Trust). Dr. Willis was the trustor and the trustee of the Trust. Dr. Willis directed that, upon his death, the successor trustees were to distribute 34.5 percent of his interest in the Gentry LLC to numerous specified individuals and entities (Gift Beneficiaries), and identified the particular percentage to be distributed to each Gift Beneficiary. All of the identified individuals were unrelated to Dr. Willis, except for Stephen and Elizabeth (Stephen's wife). The Trust provided that the remainder of Dr. Willis's LLC interest was to be distributed among three nonprofit organizations.

Under the Trust provisions, Dr. Willis gave the successor trustees broad powers to determine the proper method and timing of the distributions, including to determine whether to liquidate the Gentry LLC and/or sell its assets to satisfy the gifts. The Trust instrument expressly recognized that the distribution of these interests "may take considerable time," and gave the trustees broad discretionary authority to vote and manage the Trust's interests in the Gentry LLC during this time. The Trust instrument

also stated that Stephen "shall have no power over any interest the trust may hold in [the Gentry LLC]"

In October 2003, Stephen and his then wife Elizabeth were appointed as co-managers of the Gentry LLC. At the time, Dr. Willis had been diagnosed with cancer. Shortly after, Dr. Willis made a charitable gift of a 10 percent economic interest in the Gentry LLC to the Old Globe Theatre. In February 2004, Dr. Willis transferred 4 percent of his interest in the Gentry LLC to an Oregon corporation he had previously formed.

Dr. Willis died on April 17, 2004. In January 2005, Elizabeth filed for divorce from Stephen. The next month the successor trustees removed Stephen as manager of the Gentry LLC and elected Elizabeth as sole manager.

Petition for Instructions

In May 2006, two of the successor trustees (Trustees) filed a petition for instructions under Probate Code section 17200, subdivision (b)(6). The Trustees requested that the court issue an order affirming their rights to: "(1) vote the membership interests in [Gentry LLC] . . . for the purpose of considering marketing [the Hotel] for sale . . . ; (2) vote the membership interests in [Gentry LLC] . . . for the purpose of considering dissolution of [Gentry LLC]; and (3) distribute the assets of [the Trust] to the beneficiaries as provided in the trust instrument without any member of [Gentry LLC] having the right to purchase the membership interests in [Gentry LLC]" The Trustees alleged the Gentry LLC Operating Agreement and Trust gave them the authority to engage in these acts.

Stephen opposed the petition, arguing that under the Operating Agreement's "express and unequivocal terms," he had an unconditional right to purchase Dr. Willis's membership interest upon his death. Stephen also argued the Operating Agreement precludes a member from transferring a Membership Interest to a person who is not a permissible transferee under Section 7.4 of the Agreement without offering the remaining Members a purchase right, and that none of the nonrelative Gift Beneficiaries are such permissible transferees.⁵

Hearing

The parties stipulated to the matter being heard by reference to retired Superior Court Judge Raymond Zventina (Referee). (Code Civ. Proc., § 638.) Before the hearing, Stephen moved for a nonsuit, arguing the Operating Agreement unambiguously provided him with a right to purchase the individual Gift Beneficiaries' shares upon Dr. Willis's death and objected to any extrinsic evidence being presented on the subject. After lengthy argument, the Referee denied the nonsuit motion and stated he would conditionally allow the extrinsic evidence for purposes of determining whether there were any ambiguities in the Operating Agreement, and if so, to resolve those ambiguities.

The Trustees then presented several witnesses, including the attorneys who drafted the various documents, and numerous items of documentary evidence, including

⁵ Stephen additionally argued the Operating Agreement required a per member vote, rather than a vote by percentage of ownership interest. This argument was rejected in the proceedings below, and Stephen does not challenge this ruling on appeal. We therefore do not discuss this issue.

correspondence and other memoranda prepared by Dr. Willis and Stephen, in an effort to show the Operating Agreement reflected the parties' understanding and intent that Dr. Willis could properly convey interests in the Gentry LLC to numerous individuals through his Trust, without a requirement that Stephen be offered a right of first refusal upon Dr. Willis's death.

This evidence showed that Stephen was aware of Dr. Willis's plan to convey his economic interest in the Gentry LLC to numerous individuals upon his death, and that Stephen supported this plan and understood and intended that such transfers would be permitted by the Operating Agreement. For example, shortly before Dr. Willis's death, Stephen wrote to the Trustees urging them to convince Dr. Willis to make a portion of the gifts of his Gentry LLC interests to the Gift Beneficiaries during his lifetime to reduce Dr. Willis's tax liabilities. It was only after Dr. Willis's death that Stephen raised the issue that he had a right of first refusal under the Operating Agreement. The evidence also showed that the fair market value of the Hotel was approximately \$18 million, and that Stephen's new position that he was entitled to purchase the shares of the Gift Beneficiaries for \$3.7 million (pursuant to provisions in the Operating Agreement setting the purchase price at the selling Member's capital account) was motivated by his desire to obtain the property at a substantially discounted price and undermine Dr. Willis's intent.

During the hearing, Stephen relied primarily on Article VIII of the Operating Agreement to argue that Dr. Willis's death triggered his immediate right to purchase the interests designated for the Gift Beneficiaries. He additionally relied on Articles VII and VIII to argue the Trustees have no authority to dissolve the Gentry LLC, sell the Hotel, or

distribute the Gentry LLC interests to the Gift Beneficiaries, without giving him a right to first purchase the shares.

Referee's Ruling

After permitting written closing arguments and taking the matter under submission, the Referee ruled in the Trustees' favor. In a lengthy and detailed written explanation of his ruling, the Referee rejected Stephen's argument that Section 8 of the Operating Agreement triggered his right to purchase Dr. Willis's former LLC interest. The Referee found this right applied only to the death of a "Member," and that Dr. Willis was not a "Member" when he died because he had transferred his Membership to the Trust. The Referee also rejected Stephen's argument that the Trustees have no authority to transfer interests to the nonrelative individual Gift Beneficiaries without his consent. The Referee found that during Dr. Willis's lifetime, Stephen's statements and conduct reflected his "understanding . . . that a proposed transfer of an economic interest is not an impermissible transfer under Article VII and does not trigger a right of first refusal under section 7.8." The Referee found this understanding was fully consistent with the terms of the Operating Agreement, which limits transfers only of "Membership Interests." The Referee alternatively determined Section 7.8's "right of first refusal" was inapplicable because the proposed transfers were gifts rather than sales.

In the final order, the Referee ruled that the Trustees have the "right, power, and authority": (1) to vote the Trust's "74% membership interest . . . in favor of a resolution directing [Gentry LLC] to explore marketing the [Hotel] for sale, listing the property for sale at the price and on such terms and conditions as the manager deems appropriate and

reasonable, and consummating a sale of the property"; (2) "following the sale of the [Hotel], . . . to vote the [Trust's] 74% membership interest . . . in favor of a resolution for the liquidation of [Gentry LLC]"; and (3) "to either: (a) distribute the net proceeds obtained upon liquidation of [Gentry LLC]; or (b) to distribute the 74% membership interest in [Gentry LLC] of Dr. Willis in kind (as the independent co-trustees determine in such co-trustees sole and absolute discretion) among the specific gift beneficiaries named in . . . the [T]rust, and among the residuary beneficiaries named in . . . the [T]rust, without any remaining member of [Gentry LLC] having the right to purchase the interest distributable to any of such beneficiaries." The Referee also found the Trustees were the prevailing parties and awarded them attorney fees of \$298,114 and costs of \$7,228.68.

The superior court entered judgment incorporating these rulings.

DISCUSSION

I. Contentions and Review Standards

On appeal, Stephen contends the court erred in ruling: (1) he did not have an immediate right upon Dr. Willis's death to purchase the interests in the Gentry LLC held by Dr. Willis's Trust; and (2) the Trustees could, in the future, distribute economic interests in the LLC to the Gift Beneficiaries without triggering a right of first refusal.

Stephen's right to purchase Dr. Willis's former LLC interests is governed by the terms of the Operating Agreement. An operating agreement is a contract among LLC members that govern the members' rights and obligations. (Corp. Code, § 17001, subd. (ab).) In interpreting the Operating Agreement, we apply well settled principles relating to the interpretation of written contracts.

The fundamental rule in interpreting written instruments is the ascertainment of the mutual intent of the parties. (Civ. Code, § 1636; *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670-1671.) The parties' mutual intent is determined by the words used in the agreement, which are to be understood in their ordinary and popular sense. (Civ. Code, § 1644.) To assist in ascertaining the meaning of words used in a contract, the trial court may provisionally receive extrinsic evidence that is relevant to show whether the contract is reasonably susceptible to a particular meaning. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912; see also *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) If the court determines a contractual provision is ambiguous based on this evidence, the court may rely on the evidence to determine the meaning of the contract. (*Ibid.*) In examining the language of the instrument, the court must take into consideration the entire contract and the circumstances under which it was made, including the object, nature and subject matter of the contract, and the preliminary negotiations between the parties. (Civ. Code, § 1647; Code Civ. Proc., § 1860.)

The Referee permitted the admission of extrinsic evidence, and relied, in part, on this evidence to reach his conclusions. In his appellate briefs, Stephen does not include a summary of the facts presented at the hearing, nor does he challenge the Referee's admission of extrinsic evidence to resolve ambiguities in the Operating Agreement. He has thus waived any challenge to the sufficiency of the evidence, or to any evidence presented or evidentiary rulings. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1255.) Recognizing this, Stephen argues that his assertions of error depend only on an interpretation of the

Operating Agreement, and maintains that our review is de novo. The Trustees counter that the trial court's findings should be upheld because they are based on substantial evidence and there has been no showing of an abuse of discretion.

Both parties are partially correct. Consistent with applicable legal principles, we apply a de novo standard to the court's rulings pertaining to contractual provisions that are unambiguous and/or to the rulings based on undisputed extrinsic evidence. (*Morey v. Vannucci, supra*, 64 Cal.App.4th at p. 913.) We apply a substantial evidence review to the court's resolution of disputed factual issues pertaining to the circumstances of the execution of the Operating Agreement and any ambiguous provisions. (*ASP Properties Group, L. P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1268.) The court's findings as to any disputed factual issue are binding on this court, if they are supported by substantial evidence. (*Ibid.*; *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 108.) We then apply those findings to a legal interpretation of the applicable provisions. (*Ibid.*)

In conducting this analysis, we agree with Stephen that Dr. Willis's testamentary intent is not necessarily controlling. Dr. Willis's intent is relevant only if there was evidence that this intent was known and shared by Stephen in executing and implementing the Operating Agreement. (See *Stewart Title Co. v. Herbert* (1970) 6 Cal.App.3d 957, 964 ["the uncommunicated subjective belief of a contracting party is not competent evidence to prove the meaning of the contract"].) But we find Stephen's reliance on general principles pertaining to "close corporations" to be unhelpful. In this case, we are construing the specific terms of the Operating Agreement, rather than

establishing blanket legal rules pertaining to family-operated LLC entities. Thus, Stephen's assertion that the challenged ruling "establishes a terrible and troubling precedent of all persons who own membership or partnership interests in closely-held businesses" is unpersuasive.

II. *Analysis*

A. *Immediate Right to Purchase LLC Interests Held by Trust*

Stephen first contends the Referee erred in rejecting his argument that he has an immediate right to purchase the Gentry LLC interests held by the Trust. To establish this purchase right, Stephen relies on the second and third sentences of Section 8.1, which state: "The death . . . *of a Member* shall not cause the Company to dissolve. Provided, however, except as otherwise provided in this Agreement, the occurrence of any such event, unless a transfer is made in compliance with the provisions of Section 7.4, shall entitle the Company and the remaining Members . . . to purchase such Member's . . . Membership Interest in accordance with the provisions of this Article"⁶ (Italics added.)

The Referee found this provision was inapplicable because Dr. Willis was not a "Member" within the meaning of Section 8.1 at the time of his death. This conclusion is

⁶ This provision reads in full: "Upon the occurrence of a Dissolution Event, the Company shall dissolve. The death, retirement, permitted withdrawal or bankruptcy of a Member shall not cause the Company to dissolve. Provided, however, except as otherwise provided in this Agreement, the occurrence of any such event, unless a transfer is made in compliance with the provisions of Section 7.4, shall entitle the Company and the remaining Members ('Remaining Members') to purchase such Member's ('Former Member') Membership Interest in accordance with the provisions of this Article VIII."

supported by the record. Before his death, Dr. Willis had transferred his Membership Interest to his Trust. As conceded by Stephen, a transfer to a Member's "trust" is permitted under the Operating Agreement. Under Section 7.4, a Membership Interest may be transferred to a "trust for the benefit of the Member" or to any "Affiliate of the Member," which includes a "trust . . . controlled by . . . the Member." Further, a "Member" specifically includes a "Person" who has become a Member through a transfer assignment in "accordance with Article VII" and a "'Person'" is specifically defined to include a "trust." Thus, Dr. Willis's Trust was a "Member" of the Gentry LLC under the express terms of the Operating Agreement.

Because Dr. Willis transferred his LLC membership interest to his Trust before his death, the successor trustees necessarily continued to hold this interest after Dr. Willis's death. Upon Dr. Willis's death, the revocable trust became irrevocable, but the Trust continued to exist. (See Prob. Code, § 16061.7 [pertaining to notice requirements when revocable trust becomes irrevocable].) Thus, because Dr. Willis, as an individual, was not a "Member" at the time of his death, we agree with the Referee's conclusion that Dr. Willis's death did not trigger Stephen's purchase right.

Relying on a recent Court of Appeal decision, Stephen contends that a trust can never be a "member" of a limited liability company, and instead the *trustee* of the trust is the true owner of the membership interests. (*Presta v. Tepper* (2009) 179 Cal.App.4th

909 (*Presta*).⁷ In *Presta*, two men entered into partnerships, each acting in his capacity as the trustee of his family trust. (*Id.* at p. 912.) The partnership agreements contained a provision giving the partnership the right to purchase a partner's interest upon his death. (*Ibid.*) After one of the men died, his surviving spouse argued that the family trust was the partner and therefore the partnership's right to purchase was not triggered by her husband's death. (*Ibid.*) The remaining partner then successfully brought an action to enforce the partnership's purchase right. (*Ibid.*) The reviewing court affirmed, concluding that the men, in their status as trustees, were the legal partners, and thus the partnership had the right to purchase the deceased partner's interest. (*Id.* at pp. 913-919.) The court reasoned that because a trust is not an entity legally capable of entering into a business relationship, a trust cannot be considered a partner in a partnership agreement. (*Id.* at pp. 911, 914.) The court explained "a trust is not an entity separate from its trustee, and cannot independently *do* anything—it cannot sue or be sued; it cannot enter into agreements; and it cannot fulfill the fiduciary duties of a partner." (*Id.* at p. 911.) The court additionally found the language of the partnership agreements showed the parties in fact "*intended*" that the men, not the trusts, were the actual partners in the agreement. (*Id.* at p. 917, italics in original.)

We agree with the *Presta* court that a trust is not a real party in interest and is more accurately viewed as a vehicle whereby a trustee manages property for the benefit of beneficiaries. (See *Eggert v. Pacific States Sav. & Loan Co.* (1943) 57 Cal.App.2d

⁷ *Presta* was filed after oral argument, but we allowed the parties to file supplemental briefs pertaining to issues raised by the *Presta* court's holding.

239, 243.) Unlike a corporation or partnership, a trust cannot act in its own name and must act through its legal representative (the trustee). (See *Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 548; *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787.)

But these legal conclusions are not dispositive in this case. The Operating Agreement expressly defined a "Member" to include a "trust," and the agreement expressly permitted a Member to transfer his or her interest to a "trust." This is consistent with the language of the applicable statutes governing a limited liability company, which define a "Member" to include a "person" who has been assigned an interest in the limited liability company, and a "person" means "an individual, partnership, limited partnership, *trust*, estate, association, corporation, limited liability company, or other entity, whether domestic or foreign." (Corp. Code, § 17001, subds. (x)(1), (ae), italics added.)

Given these express definitions and the evidence presented at the hearing, the question before us is not the narrow legal issue of whether a trust is an independent legal entity, but whether the parties intended the death of a trustee to trigger a purchase right under the terms of this particular Operating Agreement. In *Presta*, the court found evidence in the specific language of the partnership agreement showing that the two men forming the partnership actually intended that each individual (rather than each family trust) would serve as the "partner" for purposes of holding the partnership interest. (*Presta, supra*, 179 Cal.App.4th at pp. 917-918.) In this case, the trial court found the evidence supported a different intent, i.e., that the parties understood the Trust to be the

"Member" and specifically intended that the death of the trustee would not trigger the Section 8.1 purchase right.

Stephen challenges the evidence supporting this finding. However, by failing to provide a summary of facts presented at the hearing, *including facts supporting the Trustees' position*, he has waived his right to rely on the evidence. (See *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) Indeed, Stephen made clear earlier in his brief that his challenge is directed only at the court's legal interpretation and effect of the provisions of the Operating Agreement, and not the court's determination of factual questions. In any event, we have reviewed the record and there is substantial evidence that the parties did not intend that Dr. Willis's death would automatically provide Stephen with the right to purchase the LLC interests that had been placed in the Trust.

Stephen alternatively contends that because the Trust was revocable during Dr. Willis's lifetime, the shares were essentially owned by Dr. Willis when he died. In support, Stephen maintains that because a revocable inter vivos trust is essentially "a probate avoidance device," courts generally treat the trustor as the true owner of the estate assets. (See *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1349; *Walgren v. Dolan* (1990) 226 Cal.App.3d 572, 578.) We agree that in some contexts, a trustor is viewed as the owner of the assets of a revocable trust. For example, property in a revocable trust is generally taxed as if it were owned by the trustor, and the trustor's creditors are entitled to reach trust property. (See *Galdjie, supra*, 113 Cal.App.4th at p. 1350; *Walgren, supra*, 226 Cal.App.3d at p. 578; see also *Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 842.) Additionally, for purposes of determining the "unity of

ownership" element under easement law, the fact that an owner transferred his interest into an inter vivos revocable trust does not mean there was an actual transfer of property. (*Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 633.) Likewise, a "general power of appointment" in probate law is equivalent to a grant of absolute ownership. (See *Estate of Dailey* (1982) 130 Cal.App.3d 993, 998.)

But these general legal principles are inapplicable here. Our focus is on the language of the Operating Agreement, and the intent of the parties as reflected in that agreement. As discussed, the Operating Agreement provides that a Member may freely transfer his or her interest in the LLC to his or her trust. There is nothing in the language of the Operating Agreement limiting the trust to an irrevocable trust or indicating that at the time of the trustor's death the parties may act as if the trustor was the true legal owner of the Membership Interest in the LLC. Further, to the extent that there was some ambiguity because the Operating Agreement did not specifically address the situation when an owner transferred property to a revocable trust, there was ample evidence that the parties understood and intended at the time they executed the agreement that Dr. Willis could create a trust as a vehicle for transferring interests to unrelated individual beneficiaries after his death. In interpreting ambiguities in the agreement, we look to the actual understanding of the parties, rather than to technical legal principles which may or may not have been known by the parties.

Stephen additionally contends Dr. Willis's death triggered an immediate transfer of the assets because "a testamentary gift vests title to the gifted property in the beneficiary upon the death of the transferor." (See *Estate of Taylor* (1973) 33 Cal.App.3d 44, 48;

Burch v. George (1994) 7 Cal.4th 246, 268.) However, "[t]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." (Prob. Code, § 21102, subd. (a); *Estate of Guidotti* (2001) 90 Cal.App.4th 1403, 1407; see *In re Winter* (1896) 114 Cal. 186, 188.) The Trust did not contain any provisions triggering an immediate termination of the Trust upon Dr. Willis's death. The Trust instrument instead provided the successor trustees with the express power to continue to manage and operate the business for a substantial period of time and to engage in the process of selling the business, consistent with the provisions of the Operating Agreement. The fact that the interests of the Gift Beneficiaries may have vested did not affect the Trustees' authority to act under the circumstances.

We also reject Stephen's argument that under Section 7.4 of the Operating Agreement, the Trustee's powers "expired" upon Dr. Willis's death because the Trust no longer "benefitted" Dr. Willis. Section 7.4 provides that a Member's "Membership Interest" may be transferred without prior consent "by inter vivos gift or by testamentary transfer to any [identified relative] or to a trust *for the benefit of the Member . . .*" (Italics added.) Stephen argues that because the "the trust no longer benefitted" Dr. Willis upon his death, the trust "cannot be a permissible transferee." However, the Trust was not a transferee upon Dr. Willis's death. The Trustees merely retained ownership of the assets. Stephen does not direct us to any provisions showing that that once a Membership Interest has been transferred to a permissible transferee, the transfer can be later invalidated.

Stephen additionally contends the Referee erred in failing to determine that the Trustee's administrative duties should be terminated. In support, Stephen relies on Section 7.6 of the Operating Agreement, which states that a deceased member's legal representatives may exercise the Member's rights "for the purposes of settling the Member's estate." Stephen argues that this provision limits the time period in which the Trustees were permitted to act.

However, the Trustees' powers to act after Dr. Willis's death depend on the Trust instrument. The Referee specifically found the Trustees were acting within their powers to manage the Trust on behalf of the beneficiaries. As found by the Referee, the Trust provisions gave the Trustees almost "unlimited" discretion in determining the best method for transferring the LLC interests, and this includes holding the LLC interests for a substantial period to permit the Trustees to sell the Hotel.

Stephen maintains the Trustees are required to offer him the right to purchase the interests of the Trust beneficiaries *before* the Trustees may make any efforts to sell the Hotel or dissolve the LLC since to do otherwise would render his other LLC rights "meaningless." The argument is unsupported. Before Dr. Willis transferred his interest into the Trust, Dr. Willis had the right to sell the Hotel or dissolve the LLC, without any input from Stephen. After Dr. Willis transferred his interests in the LLC to his trust, the Trustees had these same powers.

If Stephen had wanted to limit Dr. Willis's broad rights to transfer his ownership of his LLC interest to a revocable trust and then to designate these interests as gifts to third parties, Stephen could have attempted to negotiate these terms in the Operating

Agreement. The evidence shows that not only did Stephen not seek such limitations, but he encouraged and supported Dr. Willis's estate plan to transfer his LLC interests by way of his Trust. Absent indication to the contrary, we are bound to interpret the agreement as it was written, not as Stephen now would like it to have been written.

III. *Restrictions on the Trustee's Future Transfer of Interests to the Beneficiaries*

Stephen additionally contends the judgment was legally erroneous because it permits the Trustees to transfer economic interests in the Gentry LLC to the Gift Beneficiaries who fall outside the permissible transfer categories identified in Section 7.4.⁸

Article VII of the Operating Agreement governs a Member's right to transfer interests. Several of the sections limit transfers or condition transfers on obtaining approval, but each of these restrictions *refer specifically* to a transfer of a "*Membership Interest*." (Italics added.) The Operating Agreement defines a "'Membership Interest'" as "a Member's entire interest in the Company, including the Member's Economic Interest, the right to vote on or participate in the management and the right to receive information concerning the business and affairs of the Company." An "'Economic Interest'" is defined as the right to economic benefits (e.g., profits, distributions), without

⁸ Section 7.4 provides: "Family and Affiliate Transfers. The Membership Interest of any Member may be transferred, subject to compliance with Section 7.2 but without the prior written consent of all the Members . . . , (i) by inter vivos gift or by testamentary transfer to any spouse, parent, sibling, in-law, child or grandchild of the Member or to a trust for the benefit of the Member or such spouse, parent, sibling, in-law, child or grandchild or the Member or (ii) to any Affiliate of the Member, it being agreed that in executing this Agreement each Member has consented to such transfers."

informational or voting rights. An "Economic Interest Owner" is "the owner of an Economic Interest who is not a Member."

Because the Operating Agreement expressly restricts transfers only of a "Membership Interest," the only logical conclusion is that the parties did not intend to limit or restrict the transfer of Economic Interests. In arguing for a contrary conclusion, Stephen relies on the portion of Section 7.8 which states that a Member shall have the right of first refusal, each time another Member proposes to convey "*all or any part of his or her Membership Interest . . .*" (Italics added.) Stephen argues that because an Economic Interest is "one part of" a Membership Interest, this provision applies to the proposed transfer of an Economic Interest.

This proposed interpretation of Section 7.8 is unsupported. Section 7.8's reference to "any part of his or her Membership Interest" refers to a percentage of the Membership Interest held by the member (e.g., transferring 10 percent of a Membership Interest), not a transfer of a component part of the interest. This conclusion is supported by each of the other provisions of Article VII, which refer only to the transfer of a "Membership Interest," and not a part of the interest. It would make no sense to restrict transfers of only "Membership Interests" and then provide a right of first refusal for a transfer of a component part of that interest (the Economic Interest).

Moreover, to the extent there is any ambiguity, the extrinsic evidence supports the Referee's interpretation. The Referee specifically found that Stephen's conduct and statements after signing the Operating Agreement reflected his full understanding that Dr. Willis could transfer Economic Interests without limitation. For example, the Referee

noted that before Dr. Willis died, Stephen was a "vigorous advocate of Dr. Willis' making present gifts of economic interests to the non-relative employees and friends specified in his [T]rust . . . to take advantage of the [annual gift tax] exclusion . . . " and that Stephen argued that these gifts "could be considered 'an advancement' of their legatee or residual shares under [Dr. Willis's] trust. . . ."

This evidence was relevant to the proper interpretation of the Operating Agreement. "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242.)

Additionally, as noted by the Referee, interpreting the Operating Agreement as prohibiting transfers only of a voting interest "comports with common sense. . . . A transfer of voting rights outside the family circle could lead to control by outsiders. A transfer of economic interest, by contrast, does not involve any control issues. It is functionally little different from the transferor's receiving a distribution of net profits and giving it to the transferee. Giving [a transferee] the economic interest simply reduces the process to a one-step direct pay mode." We concur with this reasoning.

On this record, the court did not err in ruling that the Trustees could make gifts of an economic interest in the Gentry LLC to the Gift Beneficiaries without triggering Stephen's right to purchase these interests.⁹

DISPOSITION

The judgment is affirmed. Appellant to bear respondents' costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

⁹ In supplemental briefing, the Trustees conceded that the judgment did not permit them to transfer Membership Interests (with voting rights) to any of the Gift Beneficiaries who were not permitted transferees under Section 7.4 of the Operating Agreement.